BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAMON GUSMAN Claimant	)	
VS.	)	
KANSAS CITY COUNTRY CLUB Respondent	)	Docket No. 1,030,100
AND	)	
REPUBLIC INDEMNITY CO. OF AMERICA Insurance Carrier	)	

ORDER

Claimant requests review of the October 19, 2006 preliminary hearing Order entered by Administrative Law Judge (ALJ) Robert H. Foerschler.

ISSUES

The ALJ found that it was "doubtful that carpal tunnel problems could have developed in the few months he [claimant] has been at work for respondent"[1], and therefore there was no apparent jurisdiction to grant benefits.

The claimant requests review of this decision alleging that the evidence has established that he suffered an acute injury on June 10, 2006 (when he fell in a freezer injuring his wrist) and that in the days before and after that fall, his work activities as a banquet chef caused him pain in his right wrist. Claimant requests that the Board reverse the ALJ's denial of his claim asserting that the ALJ seemed "confused about the claim being asserted by the claimant".[2]

Respondent argues that the preliminary hearing Order should be affirmed. First, respondent contends the Board has no jurisdiction to consider the temporary total disability

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[1] ALJ Order (Oct. 19, 2006).

[2] Claimant Brief at 10 (filed Nov. 13, 2006).

aspect of claimant's claim. Second, respondent maintains the claimant consistently failed to tell the physicians or respondent of the existence of his fall on June 10, 2006. It was only after July 24, 2006, when claimant learned the results of the MRI which showed a scaphoid fracture, that claimant notified respondent of his fall and the alleged resulting fracture. Based upon this delay, respondent maintains claimant's version of the events was not believed by the ALJ and that factual conclusion serves as the basis for his denial of claimant's request for benefits.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Although the claimant's counsel suggests the ALJ seemed to be confused about the claim being asserted, this Board Member respectfully suggests that any resulting confusion is largely the result of claimant's own confusing testimony.

Claimant suffered a fractured right wrist in 2004 while engaging in a boxing activity in Tampa, Florida. He moved to the Kansas City area in August of 2005, and in October or November of 2005 had his wrist x-rayed by a family friend. Claimant denies any ongoing complaints leading up to this x-ray. According to claimant, his fracture had healed and he had no further complaints.

Beginning on April 17, 2006, claimant began working for respondent as a banquet chef. According to claimant this job required him to repetitively use his hands to prepare food. Claimant states that, beginning on June 8, 2006 he began to notice pain in his right wrist. Then, on June 10, 2006, the claimant was carrying a tray of food to the cooler when he slipped and fell. Claimant stated that he stretched out his right arm in order to break his fall and landed on his right wrist. Claimant felt some discomfort but apparently continued to work. His wrist did not swell, but remained painful with activity.

Claimant's right wrist pain continued and on June 15, 2006 he went to Shawnee Mission Urgent Care and saw Saro Eloisa, a licensed EDR. According to the records and claimant's own testimony, he did not disclose the fact that he fell. Ms. Eloisa diagnosed carpal tunnel and took the claimant off work. She also requested x-rays which showed no fracture. In fact, the radiologist indicated only a "[p]robable old healed distal right radial fracture with no acute osseous abnormality".[4]

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[3] Respondent does not express a timely notice defense, only that claimant complained of carpal tunnel complaints arising out of his job and that diagnosis has been abandoned.

[4] P.H. Trans., Cl. Ex. 4 at 11.

Claimant testified that on June 15, 2006 he attempted to report his wrist pain to Chef Andrew Kneessy, but was "scolded" out.[5] Claimant did give a letter to respondent indicating he had been diagnosed with carpal tunnel due to his work activities and that he required treatment.[6]

Claimant was then referred to Dr. Kelly, a neurologist, who noted claimant's complaints to his right forearm and palm. Dr. Kelly did some testing and found nothing and then referred the claimant to see Dr. Burrel C. Gaddy, an orthopedist. Dr. Gaddy's records indicate claimant complained of right hand pain over the last month with no specific trauma. Dr. Gaddy noted the x-rays from June 15, 2006 which showed changes of the distal radius consistent with an old fracture "but no acute abnormalities, destructive lesions, etc.".[7](Emphasis added) The MRI revealed a fracture to the scaphoid bone and damage to the fibro cartilage in the wrist.[8]

Once claimant received this diagnosis regarding a fracture, he advised respondent of his need for treatment. This occurred sometime after July 24, 2006, when claimant met with Dr. Gaddy about his MRI results.

Claimant was ultimately sent by respondent to see Dr. Gary Baker for an evaluation that occurred on August 30, 2006. During this examination, claimant finally disclosed the fact that he fell on June 10, 2006. In fact, his presentation at this visit is altogether different. At this point, claimant specifically references a fall at work on June 15, 2006.[9] He makes no mention of complaints predating this event, although claimant still maintains that he first noticed wrist pain *before* June 10, 2006 due to his repetitious work activities. And there is no mention in Dr. Baker's records of the x-rays taken on June 15, 2006 which are totally devoid of any mention of a new fracture in claimant's right wrist. To the contrary, those x-rays, taken after the fall, specifically reference an *old* fracture.

Nonetheless, based upon his review of the records made available to him and claimant's recitation regarding a fall while at work, he concluded claimant's present scaphoid fracture is attributable to his fall on June 10, 2006. Dr. Baker recommended that

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[5] *Id.* at 8.

[6] *Id.* at 9.

[7] *Id.*, Cl. Ex. 2 at 5 (Dr. Gaddy's report dated 7/10/06).

[8] *Id.* at 14.

[9] Claimant initially thought his fall occurred on June 15th, but he now says it occurred on June 10, 2006.

the claimant have another MRI and that the claimant start taking Celebrex and return to see Dr. Gaddy, the orthopedist.[10]

After hearing claimant's testimony and reviewing the medical records, the ALJ denied claimant's request for further medical treatment and temporary total disability benefits. The ALJ appeared to view this claim as a series of accidents occurring over a period of time. He reasoned that "[i]t is doubtful that carpal tunnel problems could have developed in the few months he has been at work for respondent."[11] In essence, he concluded that claimant's carpal tunnel complaints could not have developed during the period of time claimed by claimant, from June 8 to June 15, 2006. The ALJ made no mention of the acute injury of June 10, 2006.

This Board Member has reviewed the record and concludes, albeit for a different reason, that the ALJ's preliminary hearing Order should be affirmed.

Claimant's testimony is, at best, confusing. He maintains he began to notice right wrist problems the week of June 8, 2006. But he did not work on June 8, 2006. And even if the complaints began June 9, 2006, he had not yet had his acute injury. Then, on June 10, 2006, he testified he fell and immediately felt pain in his right wrist. But in spite of an obvious accident, he did not tell his employer. He continued to work until June 15, 2006 and then he sought treatment for what he then and now characterizes as a repetitive injury. He repeatedly failed to tell the physicians about his fall, complaining instead of pain to his *right palm and forearm*. After x-rays revealed no fracture, he continued to maintain he was suffering from carpal tunnel complaints, no doubt based upon the diagnoses offered by the physicians *who weren't getting an accurate history*. It is clear now, in retrospect, that claimant does not have carpal tunnel. He has a scaphoid fracture.

Only when he goes to see Dr. Baker does he disclose the alleged fall and for whatever reason it does not appear that Dr. Baker had the June 15, 2006 x-rays which showed no fractures. While it is conceivable that plain film x-rays do not reveal such scaphoid fractures, there is still the issue of claimant's credibility in failing to disclose the fact of this accident.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[12] "'Burden of proof' means the burden of a party to persuade the trier of

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[10] P.H. Trans. at 18.

[11] ALJ Order (Oct. 19, 2006).

[12] K.S.A. 2005 Supp. 44-501(a).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[13]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[14]

Based upon this record, this Board Member does not find that claimant has met his burden of proof. Put simply, this Member is not persuaded that claimant suffered an acute injury on June 10, 2006, nor any series of injuries thereafter. Accordingly, the ALJ's preliminary hearing Order is affirmed in all respects.[15]

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[16] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Robert H. Foerschler dated October 19, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2006.

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BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge

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[13] K.S.A. 2005 Supp. 44-508(g).

[14] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

[15] Because the claim is, for now, found noncompensable, there is no reason to address the claimant's request for temporary total disability benefits.

[16] K.S.A. 44-534a.